

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

DEBORAH G. MORGAN,  
Appellant,

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DOCKET NUMBER  
PH07528710588

DATE: NOV 9 1988

Walter Gaines, Jr., Richmond, Virginia, for the  
appellant.

Thomas J. Blum, Esquire, Philadelphia, Pennsylvania,  
for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The agency has petitioned for review of the November 17, 1987, initial decision that reversed its removal action. For the reasons set forth below, the Board DENIES the agency's petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and VACATES the initial decision. The agency's removal action is NOT SUSTAINED.

BACKGROUND

The appellant was removed from the position of Letter Carrier, effective July 20, 1987, based on the charge of physical inability to meet the requirements of her position. The notice of proposed removal stated that the agency had no alternative but to terminate the appellant's employment because she could no longer perform her regular duties as a carrier. As support for its proposal, the notice cited an April 8, 1987, medical report indicating that the appellant had "degenerative facet disease" of her back, and a later report from the appellant's physician indicating that the appellant had a permanent condition that prevented her from engaging in most of the physical activities necessary to perform her duties as a Letter Carrier. The appellant did not respond to the proposal notice. The agency's deciding official sustained the charge against the appellant, finding that it was fully supported by the evidence and warranted her removal.

The appellant appealed her removal to the Board's Philadelphia Regional Office. After a hearing, the administrative judge reversed the agency's action, finding that the charge of physical inability to perform could not be sustained because the actual reason for the appellant's removal was her erratic and non-productive behavior at work. Although noting that the medical evidence of record showed that the appellant's back ailment prevented her from meeting the physical requirements of her position, the

administrative judge determined that the appellant's condition could have been accommodated by the agency, and that the appellant therefore was a "qualified handicapped employee." In this regard, the administrative judge also found that, while the preponderance of the evidence established that the agency had available light-duty assignments consistent with the appellant's medically-imposed work restrictions, it nevertheless discontinued the appellant's placement on light duty in order to create an excuse to terminate her employment.

In its petition for review, the agency contends that: (1) Because the preponderance of the evidence shows that the appellant was physically unable to meet the requirements of her position, the charge against the appellant should have been sustained; and (2) the agency did not discriminate against the appellant on the basis of her physical handicap.

#### ANALYSIS

The adverse action taken by the agency does not promote the efficiency of the service.

The agency proved by preponderant evidence that the appellant was physically incapable of performing the essential duties of her Letter Carrier position. The fact of the appellant's physical incapacity was undisputed and was established by the medical reports provided to the agency by the appellant in support of her request for reassignment and/or light duty. See Appeal File (A.F.), Tab 4, Subtab C. Those medical reports diagnosed the appellant

as suffering from a permanent back condition, and indicated that the condition prevented her from performing any heavy lifting, forward bending and twisting, carrying objects on one side of her body, continuous walking or sitting, and extreme reaching and bending -- i.e., most of the physical activities necessary for the appellant to perform the essential duties of her position. *Id.* The agency consequently placed the appellant on light duty. When it became clear that the appellant's condition was permanent, the agency discontinued her light-duty assignment and proposed her removal. We find that the agency's actions in this regard were proper and fulfilled any obligations to the appellant that the agency may have had under either its internal regulations or its collective bargaining agreement. See *Clark v. Defense Logistics Agency*, 36 M.S.P.R. 162, 165 (1988), citing *Snipes v. Department of the Navy*, 19 M.S.P.R. 165 (1984) (a prior temporary assignment to light duty does not establish entitlement to permanent light duty once it is clear that the employee's handicap is permanent).

The administrative judge explicitly recognized that the appellant could not meet the physical requirements of her position. See Initial Decision at 6. She nevertheless determined that the charge against the appellant could not be sustained because the removal action actually was based upon the appellant's "erratic and non-productive behavior." See *id.* The record does not support such a conclusion. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980)

(in reviewing an initial decision, the Board is free to substitute its own determinations of fact for those of the administrative judge, giving the administrative judge's findings only as much weight as may be warranted by the record and by the strength of the administrative judge's reasoning), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*).

While the appellant's allegedly aberrant behavior may have played some part in the agency's deliberations leading to its decision to remove her, the agency did not charge the appellant with such misbehavior. Further, the evidence does not show that the agency relied upon anything other than the appellant's physical inability to perform in proposing her removal. Thus, the mere fact that the agency may have considered the appellant's behavior does not constitute a basis for finding that the agency's stated charge should not be sustained. *Cf. Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 359 (1981) (the Board will sustain the charge upon which the agency action is based if supported by preponderant evidence). In this regard, we find that the preponderance of the evidence of record plainly demonstrates that the appellant was physically incapable of performing the essential duties of her Letter Carrier position.

Prior to the close of the record below, however, the agency submitted evidence indicating that the appellant's physical condition had improved and that she consequently had been reinstated in her position as of October 19, 1987.

See A.F., Tab 12. This evidence is directly material to the sole charge on which the appellant was removed, i.e., physical inability to perform, and is related to the physical condition that formed the basis for her removal. For this reason, notwithstanding our determination that the appellant was physically incapable of performing the essential duties of her position at the time of her removal, we find that the adverse action taken by the agency can no longer be considered to have been "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). See *Street v. Department of the Army*, 23 M.S.P.R. 335, 342-43 (1984).<sup>\*</sup> Thus, the agency's removal action cannot be sustained.

The appellant has not established a prima facie case of handicap discrimination.

A Federal agency is required to make reasonable accommodation to the known physical or mental limitations of a "qualified handicapped employee" unless the agency can demonstrate that the accommodation would pose an undue hardship on its operations. 29 C.F.R. § 1613.704; *Savage v. Department of the Navy*, 36 M.S.P.R. 148, 151 (1988). Failure to make reasonable accommodation in accordance with this requirement constitutes discrimination on the basis of handicap, and an action that resulted from such

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<sup>\*</sup> As in *Street*, the Board here does not impugn the judgment of the agency in taking the action based on the facts that it knew at the time it effected the appellant's removal.

discrimination cannot be sustained on appeal to the Board.  
5 U.S.C. §§ 2302(b)(1)(D), 7701(c)(2)(B).

In *Stalkfleet v. United States Postal Service*, 6 M.S.P.R. 637, 647-48 (1981), the Board set forth the order of proof in a handicap discrimination case. Although the appellant always has the burden of persuasion, the burden of going forward with the evidence shifts: The appellant must establish a prima facie case of handicap discrimination; the burden of production then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action and to demonstrate that reasonable accommodation would impose an undue hardship on its operations; and, finally, the appellant must show that the agency's articulated reason for its action is merely a pretext for prohibited handicap discrimination.

In *Savage*, 36 M.S.P.R. at 152, the Board stated that the elements of a prima facie case generally include the following: (1) A showing that the appellant is a handicapped person under 29 C.F.R. § 1613.702(a), and that the action appealed to the Board was based on her handicap; and (2) to the extent possible, articulation of a reasonable accommodation under which the appellant believes she could perform the essential duties of her position or of a vacant position to which she could be reassigned.

We find that the appellant here has not established a prima facie case of handicap discrimination. Although the appellant demonstrated that she had had a physical

impairment that substantially limited her "major life activity" of work, see 29 C.F.R. § 1613.702(a), and that the agency had removed her because of that impairment, she failed to articulate a "reasonable accommodation" that she believed would have enabled her to perform the essential duties of her position or of a vacant position to which she could be reassigned. See *Savage*, 36 M.S.P.R. at 152. In this regard, the record shows that the appellant did not request the agency to permanently restructure her position or to modify her work schedule in a manner consistent with her medical restrictions. *Id.* Rather, the only request the appellant made was one for a permanent transfer to a vacant position in either the Clerk or Custodian crafts. See A.F., Tab 4, Subtab 4. The appellant made this single request prior to suffering the injury that she claims caused the onset of her back problems. Further, the request was grounded, not upon the appellant's back condition, but upon unspecified "slight handicaps" and "stress." *Id.* Because the appellant has not articulated a reasonable accommodation for the disabling medical condition that formed the basis for her removal, we find that she has failed to meet her burden of establishing a *prima facie* case of handicap discrimination. Accordingly, the agency's adverse action did not constitute an act of discrimination against the appellant on the basis of her physical handicap.



ORDER

The agency is ORDERED to cancel the appellant's removal and to retroactively restore the appellant effective July 20, 1987. See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). This action must be accomplished within 20 days of the date of this decision.

The agency is also ORDERED to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits as required by Postal Service regulations, no later than 60 calendar days after the date of this decision. The appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information requested by the agency to help it comply.

The agency is further ORDERED to inform the appellant in writing of all actions taken to comply with the Board's order and the date on which it believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

If there is a dispute about the amount of back pay and/or interest due, the agency is ORDERED to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision. The appellant may then file a petition for enforcement with the regional office within 30 days of the agency's notification of compliance to resolve the disputed amount. The petition

should contain specific reasons why the appellant believes that there is insufficient compliance, and include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

#### NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

#### Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission  
Office of Review and Appeals  
5203 Leesburg Pike, Suite 900  
Falls Church, VA 22041

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7702(b)(1).

#### Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims

and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review


If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you

personally, whichever receipt occurs first. See 5 U.S.C.  
§ 7703(b)(1).

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.